IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 14, 2008 Session

# R. DOUGLAS HUGHES ET AL. v. NEW LIFE DEVELOPMENT CORPORATION

**Appeal from the Chancery Court for Franklin County**
**No. 18,444 Thomas W. Graham, Judge**

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**No. M2008-00290-COA-R3-CV - Filed February 17, 2009**

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Homeowners in a wooded subdivision established as part of a mountain preserve development brought suit to prevent purchaser of surrounding 1,400 acres from developing the property. The trial court granted judgment on the pleadings on all of the plaintiffs' claims. We have concluded that the trial court erred in granting judgment on the pleadings with respect to some of the plaintiffs' claims. We therefore affirm in part and reverse in part.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part, Reversed in Part**

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Frederick L. Hitchcock, Chattanooga, Tennessee, for the appellants, R. Douglas Hughes, M. Lynne Hughes, Louise Hubbs, and Guy Hubbs.

Joseph A. Woodruff and Michael A. Gardner, Nashville, Tennessee, and Douglas S. Hale, Franklin, Tennessee, for the appellee, New Life Development, Inc.

## OPINION

### FACTUAL AND PROCEDURAL BACKGROUND

The appellants, R. Douglas and M. Lynne Hughes and Louise and Guy Hubbs (collectively "Homeowners"), own property and homes in a subdivision in an area commonly known as Cooley's Rift, which is located on Monteagle Mountain in Franklin County and Grundy County. The appellee, New Life Development Corporation ("New Life"), purchased approximately 1,400

undeveloped acres in Cooley's Rift as well as eleven unimproved subdivision lots in July 2005. At issue in this case is New Life's ability to develop its property.

The original developer of Cooley's Rift was Raoul Land Development Company ("RLD"), a Tennessee corporation. A promotional booklet entitled "Cooley's Rift: A Mountaintop Preserve" includes the following statement:

> Situated on a 2000-foot mountaintop in Monteagle, TN, Cooley's Rift is 1450 acres of serenity with nearly 1000 acres to be preserved in perpetuity. Only 80 homesites which are up to 8 acres in size will ever be constructed. The rest of this natural wonder is to remain untouched for your children and your children's children.

The following statement appeared on the next page of the booklet:

> The text, renderings and certain photographs in this book are descriptions and visualizations of preliminary design and facility concepts. These concepts are subject to change by the developer and by regulatory authorities without notice. These renderings and photographs shall not create an obligation to construct the concepts shown, or if the concepts are constructed, an obligation to use any particular materials or to construct in any particular standard or quality.

Another document entitled "Cooley's Rift: Design Guidelines" and dated March 22, 2000, touted the community's natural amenities and again made reference to "1000 acres to be maintained as natural forest preserve." The Guidelines specify that they "will remain flexible over time, creating opportunity to respond to buyer tastes and the master developer's desire to create a quality community." The Guidelines also state: "All Cooley's Rift property owners are enrolled as members in good standing of the Cooley's Rift Homeowners[']s Association (CRHA). Members are thereby subject to the Declarations of Covenants and Restrictions . . . and by-laws of the Cooley's Rift Homeowners[']s Association (CRHA)." Interested persons were referred to the Cooley's Rift sales center for details and copies of the current covenants and bylaws.

In 2002, RLD recorded a subdivision plat for "Cooley's Ridge Phase I" ("the subdivision") designating approximately 26 sites.[1] RLD also recorded, in both Franklin and Grundy counties, a document entitled "Declaration of Covenants and Restrictions for Cooley's Rift Preserve" (hereinafter referred to as "the Declaration" or "the Restrictive Covenants"). The terms of the Restrictive Covenants will be discussed below. Included with the Restrictive Covenants were Bylaws for Cooley's Rift Homeowners' Association, Inc. ("Homeowners' Association"). Homeowners purchased their properties from RLD.

[1]The copy of the recorded subdivision plat in the record is not large enough to allow the court to discern the details regarding the individual sites.

Pursuant to a special warranty deed recorded on September 6, 2005, New Life bought the property at issue from RLD. The purchase included eleven unimproved tracts in the subdivision as well as some 1,400 acres of undeveloped land. The deed provides that the transfer is subject to numerous easements and conditions,[2] including the Restrictive Covenants.

On April 16, 2007, Homeowners[3] filed suit against New Life alleging that RLD "created a comprehensive general plan for development of Cooley's Rift" prior to Homeowners' purchase of their tracts and that this plan was described in various RLD documents, including the Cooley's Rift descriptive booklet and design guidelines described above. Homeowners asserted that, "The Cooley's Rift Plan promised extensive common properties and amenities (the "Amenities and Preserves") for the benefit of the Plaintiffs and other owners of home lots in Cooley's Ridge. . . ." In purchasing their lots, Homeowners asserted, they reasonably relied upon RLD's representations that Cooley's Rift would be developed in accordance with the plan. Homeowners further alleged that New Life knew of this plan when it bought property in Cooley's Rift and took title subject to the plan. According to the complaint, New Life had announced its "intent to develop its property in Cooley's Rift in ways that violate the Cooley's Rift Plan and the Restrictive Covenants."

The complaint sets out seven counts: (1) an action for enforcement of three express restrictions of the Restrictive Covenants, (2) a derivative action on behalf of the Homeowners Association to enforce the express covenants, (3) a derivative action for an injunction *qui timet "*to prevent New Life from altering or destroying any of the Amenities and Preserves," (4) a derivative action for specific enforcement of "the transfer of title to the Amenities and Preserves to the Homeowners Association, as required by the Restrictive Covenants," (5) an alternative derivative action for a constructive trust to protect the Homeowners Association's rights in the Amenities and Preserves, (6) action for enforcement of Cooley's Rift development plan created by RLD and "enforceable by the Plaintiffs as implied covenants that are binding upon New Life as the successor to the Raoul Company with the knowledge of the Cooley's Rift Plan," and (7) a direct action to impose a constructive trust.

On April 25, 2007, New Life filed its answer and a motion for judgment on the pleadings or, in the alternative, summary judgment. After a hearing on November 27, 2007, the trial court granted New Life's motion for judgment on the pleadings. In its order, the court found that "the Declaration of Covenants And Restrictions For Cooley's Rift Preserve confines these covenants and restrictions to those lands that fall within the boundaries of the lots and roads as shown on the recorded plat entitled 'Cooley's Rift Subdivision, Phase I.'" The court further concluded that, pursuant to the terms of the Restrictive Covenants, there were no implied covenants applicable to New Life's unsubdivided property. As to the Homeowners' constructive trust arguments, the court concluded

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[2]These conditions include participation in the Greenbelt program. *See* Tenn. Code Ann. § 67-5-1001, *et seq*.

[3]The original plaintiffs included four other homeowners (two couples) in addition to the appellants. One couple obtained a voluntary dismissal prior to the hearing, and the other couple obtained a voluntary dismissal after the hearing.

that, in light of the disclaimer in the brochure and the language of the recorded Restrictive Covenants, the Homeowners were not entitled to equitable relief in the form of a constructive trust. Having rejected the bases for relief underlying all of the Homeowners' claims, the court granted judgment on the pleadings in favor of New Life.

On appeal, the Homeowners argue that the trial court erred in finding that the Restrictive Covenants did not apply to all of New Life's property in Cooley's Rift and that the trial court erred in granting judgment on the pleadings regarding Homeowners' claims based upon implied restrictive covenants. Homeowners further assert that the trial court erred in granting judgment on the pleadings regarding their constructive trust claims and their other direct and derivative claims.

## STANDARD OF REVIEW

Judgment on the pleadings is proper when the facts alleged in the complaint, even if proven, do not entitle the plaintiff to relief. *Waller v. Bryan*, 16 S.W.3d 770, 773 (Tenn. Ct. App. 1999). In considering such a motion, the court must generally consider "as true 'all well-pleaded facts and all reasonable inferences drawn therefrom'" alleged by the non-moving party. *Cherokee Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466, 470 (Tenn. 2004) (quoting *McClenahan v. Cooley*, 806 S.W.2d 767, 769 (Tenn. 1991)).

Under Tenn. R. Civ. P. 12.03, if "matters outside the pleadings are presented to and not excluded by the court, the motion [for judgment on the pleadings] shall be treated as one for summary judgment . . ." In reviewing a trial court's action on a motion for summary judgment, this court must then make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50 (Tenn. 1997). In this case, the pleadings referenced documents that were attached thereto, including the deed transferring property to New Life, promotional materials regarding Cooley's Rift, the Declaration, and subdivision plats. Tenn. R. Civ. P. 12.02 and 12.03 are patterned after similar federal rules; therefore, federal decisions provide guidance in the interpretation of the Tennessee rules. *Patton v. Estate of Upchurch*, 242 S.W.3d 781, 787 n.2 (Tenn. Ct. App. 2007). It has been held that, in ruling on a motion to dismiss under Rule 12, a court may consider exhibits attached to the complaint (as well as certain other documents) without converting the motion to one for summary judgment. *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008). We therefore conclude that the trial court's decision should properly be reviewed as a judgment on the pleadings.

## ANALYSIS

### *Express Restrictive Covenants*

Homeowners argue that the trial court erred in holding that the Restrictive Covenants did not apply to all of New Life's property in Cooley's Rift.

Under well-settled Tennessee law, "[a] grantor has a right to impose such legal restrictions as he desires upon the property he aliens." *Ridley v. Haiman*, 47 S.W.2d 750, 753 (Tenn. 1932). Such restrictions, commonly known as restrictive covenants, are not favored because they interfere with the free enjoyment of property and are to be strictly construed. *Land Developers, Inc. v. Maxwell*, 537 S.W.2d 904, 918 (Tenn. 1976); *Lowe v. Wilson*, 250 S.W.2d 366, 367 (Tenn. 1952). Restrictive covenants are, however, binding on remote grantees if they appear in the chain of title or if the grantee had actual notice of them when the grantee acquired title. *Maxwell*, 537 S.W.2d at 913; *Stracener v. Bailey*, 737 S.W.2d 536, 539 (Tenn. Ct. App. 1986). Restrictive covenants, like other contracts, are enforceable according to the expressed intent of the parties. *Jones v. Englund*, 870 S.W.2d 525, 529 (Tenn. Ct. App. 1993).

We begin, then, with the terms of the Restrictive Covenants applicable in the present case. Section 3.01 of the Declaration provides in pertinent part as follows:

> The Covenants apply only to the Property described in Exhibit "A" attached hereto and to no other property, tracts or parcels of land in the area or vicinity, which may be owned by the Developer. Specifically, the Developer reserves the right to use or convey such other property, tracts and parcels with different (or no) restrictions.

In the definition section, the Declaration defines "Property" to mean "the real property described in Section 2.01 hereof, and additions thereto, and improvements thereon as are subjected to this Declaration or any supplemental declaration under the provision hereof." Section 2.01, in turn, provides that "[t]he real property which is, and shall be held, transferred, sold, conveyed, leased and occupied, subject to these Covenants, is located in Grundy and Franklin Counties, Tennessee and is more particularly described in Exhibit "A" hereto and additions or amendments thereto."

Exhibit A, then, is the key provision delineating the property covered by the Restrictive Covenants. Exhibit A states, in pertinent part:

> The property that is subject to this Declaration consists of Homesites 1-8, 46-58, 0, 00, and 51-A as shown on that certain plat titled "Cooley's Rift Subdivision Phase I" recorded in Plat Book 1, Page 316-320 in the Register's Office of Grundy County, Tennessee and recorded in Plat Envelope 371 A and B, Plat Envelope 372 A and B, and Plat Envelope 373 A in the Register's Office of Franklin County, Tennessee.

By its express terms, the Declaration specifically limits the application of the Restrictive Covenants to the enumerated lots. Thus, the express terms of the Declaration do not support the Homeowners' argument that the Restrictive Covenants apply to all of New Life's property in Cooley's Rift.

The Homeowners assert that the warranty deed by which New Life acquired its property "expressly subjected all of the property transferred to New Life to the Restrictive Covenants." In support of this argument, Homeowners cite the following language in the deed: "Subject to restrictions in Deed Book 74M, Page 466, in the Register's Office of Grundy County, Tennessee,

and Deed Book 316, Page 353, Register's Office of Franklin County, Tennessee." This is a reference to the Declaration. According to the Homeowners' reasoning, this language evidences an intent to subject all of the deeded property to the Restrictive Covenants. We cannot agree. The deed contains a list of easements and restrictions to which the property is subject. This does not mean that the easements and restrictions become applicable to the entirety of the deeded property. For example, a specific utility easement does not extend to the entire property. Similarly, the Restrictive Covenants apply according to the terms of the Declaration only to the enumerated lots. As New Life points out: "Plaintiffs' mistake is akin to interpreting a conveyance of property subject to a driveway easement to mean that the easement holder can park their car on the owner's front porch."

Homeowners also point to language in Sections 2.01 and 2.02 and the definition of "Property" in the Declaration, provisions that contemplate additions and amendments to the covered property. The problem with this argument, however, is that no such additions or amendments were made. Section 2.02(a) of the Declaration provides, in pertinent part:

> Additional lands may become subject to, but not limited to, this Declaration in the following manner:
>
> (a) Additions. The Developer, its successors, and assigns, shall have the right, without further consent of the Association, to bring within the plan and operation of this Declaration additional properties in future stages of the Community beyond those described in Exhibit "A" so long as they are contiguous with then existing portions of the Community. . . . The additions authorized under this Section shall be made by filing a Supplementary Declaration of Covenants and Restrictions with respect to the additional property which shall extend the operation and effect of the covenants and restrictions of this Declaration to such additional property after which it shall fall within the definition of Property as herein set forth.

Homeowners have not alleged or cited any supplementary declarations extending the applicability of the Declaration beyond the original subdivision lots enumerated.

While we agree with the trial court's conclusion concerning the limited applicability of the Restrictive Covenants, it appears that the trial court failed to consider several of the specific claims made by the Homeowners that reference lots within the subdivision. Count 1 of the complaint includes the following allegations:

> The New Life 2007 Plan violates the Restrictive Covenants in numerous respects, including, without limitation, the following:
>
> A. Article III, Section 3.06 of the Restrictive Covenants prohibits resubdivision of any homesite or rearrangement of lot lines except to create a larger lot on which a single dwelling is built. The New Life 2007 Plan violates the

> Restrictive Covenants, and the implementation of the New Life 2007 Plan should be enjoined.
>
> B. Article III, Section 3.03 of the Restrictive Covenants prohibits the use of any homesite for any multifamily dwelling or business service or activity or commercial or business purpose. The New Life 2007 Plan specifies the development of a commercial golf course and associated restaurants and retail business facilities on property designated as homesites. The New Life 2007 Plan also seeks the rezoning of property to permit intensive commercial development, including, upon information and belief, multifamily dwellings. The New Life 2007 [Plan] violates the Restrictive Covenants, and the implementation of the New Life 2007 Plan should be enjoined.

As previously discussed, the Declaration specifically provides that the Restrictive Covenants are applicable only to the enumerated subdivision lots. To the extent that any of New Life's proposals would apply to those enumerated subdivision lots, it is possible that such proposals would violate the Restrictive Covenants. With respect to all claims premised upon the extension of the express Restrictive Covenants beyond the enumerated subdivision lots, we conclude that the trial court properly granted judgment on the pleadings.

*Implied Restrictive Covenants*

Homeowners' most compelling argument is premised upon implied restrictive covenants. Homeowners assert that the trial court erred in dismissing their claim "that implied restrictive covenants should be enforced to implement the general plan of development and to prevent destruction by New Life of forest preserves and other amenities."

Tennessee courts have recognized and enforced implied restrictive covenants under certain circumstances. *See Arthur v. Lake Tansi Village, Inc.*, 590 S.W.2d 923, 927 (Tenn. 1979); *Maxwell*, 537 S.W.2d at 912. Our Supreme Court has held that implied restrictive covenants may arise in three circumstances: "(1) implication by necessity, (2) implication by conveying property with restrictions under a general plan or scheme of development, (3) implication by reference to a plat." *Arthur*, 590 S.W.2d at 927. Homeowners assert that all three theories support their claim in this case.

1.

Implication by necessity has been explained as follows:

> "[W]hen parties reduce their agreements to writing, the written instrument is presumed to embody their entire contract, and the court should not read into the instrument additional provisions unless this be necessary in order to effectuate the intention of the parties as disclosed by the contract as a whole. An implied covenant must rest entirely on the presumed intention of the parties as gathered from the terms as actually expressed in the written instrument itself, and it must appear that it was

> so clearly within the contemplation of the parties that they deemed it unnecessary to express it, and therefore omitted to do so, or it must appear that it is necessary to infer such a covenant in order to effectuate the full purpose of the contract as a whole as gathered from the written instrument. It is not enough to say that an implied covenant is necessary in order to make the contract fair, or that without such a covenant it would be improvident or unwise, or that the contract would operate unjustly. It must arise from the presumed intention of the parties as gathered from the instrument as a whole."

*Id.* (quoting *Danciger Oil & Refining Co. v. Powell*, 154 S.W.2d 632, 635 (Tex. 1941)). While asserting that they have "more than adequately pled their claim" under this theory, Homeowners do not point to a single allegation or fact in support of this theory. We find no basis for implication by necessity.

2.

The second theory for implied restrictive covenants, implication based upon a general plan of development, requires more analysis. Where there is a common development plan, courts have enforced implied restrictive covenants "under the rationale that a remote grantee's knowledge of such restrictions may be imputed from the existence of a common plan as evidenced in deeds or on the plat itself." *Essary v. Cox*, 844 S.W.2d 169, 172 (Tenn. Ct. App. 1992). The underlying principle is that "when grantees purchase land within a development in reliance on the general scheme or plan as expressed by the developer, equity requires that the grantees be able to mutually enforce the restrictions." *Id.* Establishment of a general plan of development may be "by implication from a filed map, or by parol representations made in sales brochures, maps, advertising, and oral statements on which the purchaser relied in making his purchase," by the grantor's promises to insert reciprocal covenants in all deeds, or by the grantor's pursuit of a course of conduct reflecting a neighborhood scheme. *Arthur*, 590 S.W.2d at 928 (quoting 20 Am.Jur.2d. *Covenants* § 175 (1965)).

In their complaint, Homeowners set out a case for implied covenants based upon their reliance on a general plan of development. The relevant allegations include the following:

> The Raoul Company created a comprehensive general plan for development of Cooley's Rift prior to the purchase by the Plaintiffs of their tracts within Cooley's Rift (the "Cooley's Rift Plan"). The Cooley's Rift Plan was described in detail in the various Raoul Company documents, including those attached to this Complaint as Exhibits 2 and 3, respectively [the promotional booklet and design guidelines].
>
> The Cooley's Rift Plan specified, *inter alia*, that ". . . *Cooley's Rift is 1450 acres of serenity with nearly 1000 acres to be preserved in perpetuity. Only 80 homesites which are up to 8 acres in size will ever be constructed. The rest of this*

*natural wonder is to remain untouched for your children and your children's children.*"

> The Cooley's Rift Plan promised extensive common properties and amenities (the "Amenities and Preserves") for the benefit of the Plaintiffs . . . The forest preserves were designated as the "North Preserve," "East Preserve," and "West Preserve" and total some 1,000 acres.
>
> . . . .
>
> Defendant New Life knew of the Cooley's Rift Plan when it purchased its property within Cooley's Rift.
>
> New Life took title to its property within Cooley's Rift subject to the Cooley's Rift Plan.
>
> Prior to the Plaintiffs' purchase of their home lots within Cooley's Rift, Raoul Company represented that Cooley's Rift would be developed in accordance with the Cooley's Rift Plan. The Plaintiffs reasonably relied upon these representations.

(Emphasis in original). The complaint goes on to describe actions allegedly taken by Raoul Company in accordance with the Cooley's Rift Plan, including adopting a subdivision plat and building roads, a gatehouse, a boathouse, and other amenities.

As quoted above, however, the promotional materials cited by Homeowners contain language indicating that the concepts and guidelines are subject to change. Regardless of any representations made concerning future development or actions taken in furtherance of a common development plan by Raoul Company prior to their sale of property to Homeowners, Homeowners acknowledge that they "took title to their property within Cooley's Rift subject to the Restrictive Covenants." We must turn to the language of the Declaration to determine whether Homeowners can prove any set of facts to entitle them to the benefit of implied restrictive covenants.

The Declaration provides that the "Master Plan" shall refer to the latest revision of that plan "[s]ince the concept of the future development of the undeveloped portions of Cooley's Rift Preserve is subject to continuing revision and change at the discretion of the Developer." "Master Plan" is defined as "the drawing which represents the conceptual land plan for future development of Cooley's Rift Preserve prepared by DM Survey, Inc." The record does not include any document identified as the Master Plan.[4] Even if the Homeowners could prove that RLD otherwise represented to them that the Master Plan would protect the undeveloped portions of Cooley's Rift and that New Life knew about these representations, the existence of implied restrictive covenants arising from

[4]In its answer, New Life asserts that "no master plan was created and any master plan was subject to change at any time at the developer's sole discretion." For purposes of judgment on the pleadings, however, we must credit the well-pleaded facts alleged by the non-moving party. *See Cherokee Country Club*, 152 S.W.3d at 470.

such representations would be negated by the following express disclaimer from the Declaration's provisions regarding the Master Plan:

> [N]o implied reciprocal covenants shall arise with respect to lands which have been retained by the Developer for future development except that all the covenants, restrictions, obligations and conditions set forth in this Declaration shall apply to all portions of the Property [delineated in Exhibit A] retained by the Developer. THIS DECLARATION DOES NOT DESIGNATE ANY PORTION OF THE PROPERTY FOR ANY PARTICULAR USE, SUCH DESIGNATION TO BE MADE BY SEPARATE SUBSEQUENT DECLARATION OR BY RECORDED PLAT . . . . THE DEVELOPER SHALL NOT BE BOUND BY ANY DEVELOPMENT PLAN, USE OR RESTRICTION OF USE SHOWN ON ANY MASTER PLAN, AND MAY AT ANY TIME CHANGE OR REVISE SAID MASTER PLAN AT DEVELOPER'S SOLE DISCRETION.

This express disclaimer regarding the existence of any implied restrictive covenants with respect to future development casts serious doubt on Homeowners' argument that they reasonably relied upon assurances with respect to future development in those areas not expressly covered by the Restrictive Covenants. *See Butler v. Sea Pines Plantation Co.*, 317 S.E.2d 464, 469 (S.C. Ct. App. 1984) (no implied restrictive covenants to dedicate certain land as forest preserve created by developer's representations or promotional documents where purchase documents expressly advised purchasers that master plans were not permanent designations and developer reserved right to modify future development plans).

But, there is more pertinent language in the Declaration. The following language appears in the definitional section concerning "Property":

> The Developer intends to develop the Property in accordance with its Master Plan, as subsequently modified from time to time, as a residential community featuring wilderness preserves for hiking and riding trails and other recreational facilities, multiple amenities and any other lawful activities which the Developer deems appropriate as uses for such Property. The Developer reserves the right to review and modify the Master Plan at its sole option from time to time based upon its continuing research and design program. The Master Plan shall not bind the Developer, its successors and assigns, to adhere to the Master Plan in the development of the land shown thereon *except as to the general location and approximate acreage of the Common Properties.*[5] The Developer shall not be required to follow any

[5]"Common Properties" are elsewhere defined to include "streets, gatehouses . . . parks, hiking and/or riding trails, wilderness preserve areas, maintenance equipment and sheds, a Manager's house or quarters, barns, lodge, and boathouses." In its answer, New Life asserts that there are no "Common Properties" as defined in the Restrictive Covenants and that "[n]o ownership rights in any Common Properties have been transferred or leased to the Homeowners Association." Again, we examine the plaintiff's well-pleaded allegations for purposes of judgment on the pleadings. *See Cherokee Country Club*, 152 S.W.3d at 470.

> predetermined sequence or order of improvements and development . . . *Other than as stated in this paragraph, the Developer shall have full power to add to, subtract from or make changes in the Master Plan.*

(Emphasis added). In contrast to the disclaimer, the italicized language suggests that the Developer is bound by the Master Plan as to "the general location and approximate acreage of the Common Properties." This language creates some ambiguity in the Declaration. On one hand, the Developer is entitled to revise the Master Plan at his discretion and the Declaration expressly disclaims any implied restrictive covenants. On the other hand, the above provision suggests that the Developer cannot revise the Master Plan to change the general concept concerning the Common Properties.

Because of this ambiguity, we must conclude that the trial court erred in granting judgment on the pleadings with respect to the possible existence of implied restrictive covenants under the theory of a general plan of development.

3.

As to the third theory for finding an implied restrictive covenant, implication by reference to a plat, Homeowners assert that the 2002 subdivision plat for Cooley's Rift Phase I created 27 lots: 24 homesites and three lots designated as forest preserves. In *Stracener v. Bailey*, the court found that an implied restrictive covenant arose from the designation of an area appearing on various subdivision plats as a park; this restriction was enforceable against a remote grantee with notice. *Stracener*, 737 S.W.2d at 539. Homeowners assert that the recorded plat contains labels for two of the alleged forest preserves, the East Preserve and the West Preserve. We are unable to discern from the record whether the recorded plat actually designates these areas as forest preserve. From the allegations included in the pleadings and attached documents, however, it appears that Homeowners have sufficiently alleged a claim for implied restrictive covenants based upon the recorded plat.

New Life asserted in its answer that the tracts in question were never platted and were expressly excluded from the definition of "Property" set forth in the Declaration. It is possible, however, that the subdivision plat provides a separate basis for implication of restrictions pursuant to the theory adopted in *Stracener*. The recorded subdivision plat is specifically referenced in New Life's deed; New Life had notice of restrictions arising out of this plat. We cannot conclude that there is no set of facts from which Homeowners might be entitled to relief based upon such a theory.

*Remaining Claims*

Homeowners also assert that the trial court erred in granting judgment on the pleadings with respect to their direct and derivative actions for a constructive trust and their other direct and derivative claims. We generally agree with the trial court's conclusion that these other theories of recovery are premised upon the existence of express or implied restrictive covenants. Their viability will, therefore, depend upon the trial court's findings on remand. We have previously discussed the express covenants applicable within the subdivision and the possibility of implied covenants. As

stated above, to the extent that Homeowners assert that New Life's plans will affect the subdivision lots enumerated in the Declaration in contravention of the Restrictive Covenants, their complaint makes out a cause of action.[6] Homeowners may also have a cause of action to the extent that it is determined on remand that implied restrictive covenants arose pursuant to the recorded plats or general plan of development.

## CONCLUSION

For the foregoing reasons, we have concluded that the trial court properly granted judgment on the pleadings with respect to any claims based upon the application of the express Restrictive Covenants outside of the enumerated subdivision lots; however, to the extent Homeowners object to New Life's proposed actions with respect to the enumerated lots, they have made out a claim. We have further concluded that the trial court erred in granting judgment on the pleadings with respect to possible implied restrictive covenants arising from the recorded subdivision plats or from a general development plan, and that any related claims for relief should be considered on remand.

Therefore, the judgment of the trial court is affirmed in part and reversed in part. Costs of appeal are assessed against both parties, half to the appellants and half to the appellee.

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ANDY D. BENNETT, JUDGE

[6]The complaint alleges that Homeowners hold sufficient votes in the Homeowners' Association to permit them to bring a derivative action. With the dismissal of four of the original plaintiffs, New Life argues, Homeowners no longer satisfy the five percent requirement of Tenn. Code Ann. § 48-56-401(a)(1). On remand, the trial court will have to determine whether Homeowners actually possess a sufficient interest.